

1 MAUREEN E. McCLAIN (State Bar No. 062050)
Email: mcclain@kmm.com
2 ALEX HERNAEZ (State Bar No. 201441)
Email: hernaez@kmm.com
3 KAUFF McCLAIN & McGUIRE LLP
One Post Street, Suite 2600
4 San Francisco, California 94104
Telephone: (415) 421-3111
5 Facsimile: (415) 421-0938

6 Attorneys for Defendant
DOLLAR TREE STORES, INC.

7
8 BETH HIRSCH BERMAN (VA Bar No. 28091)
Email: bberman@williamsmullen.com
WILLIAMS MULLEN
9 Dominion Tower, Suite 1700
999 Waterside Drive
10 Norfolk, VA 23510
Telephone: (757) 629-0604
11 Facsimile: (757) 629-0660

12 *Pro Hac Vice* Attorneys For Defendant
DOLLAR TREE STORES, INC.

13
14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 MIGUEL A. CRUZ, and JOHN D. HANSEN,
17 individually and on behalf of all others
similarly situated,

18 Plaintiffs,

19 v.

20 DOLLAR TREE STORES, INC.,

21 Defendant.

22
23
24 ROBERT RUNNINGS individually, and on
behalf of all others similarly situated,

25 Plaintiff,

26 v.

27 DOLLAR TREE STORES, INC.,

28 Defendant.

CASE NO. C 07 2050 SC
CASE NO. C 07 04012 SC

**DOLLAR TREE STORES, INC.'S
MEMORANDUM IN OPPOSITION
TO PLAINTIFF ROBERT
RUNNINGS REQUEST FOR
JUDICIAL NOTICE**

DATE: March 21, 2008
TIME: 10:00 a.m.
DEPT: Ctrm. 1, 17th Floor
JUDGE: Hon. Samuel Conti

COMPLAINTS FILED: April 11, 2007
July 6, 2007
TRIAL DATES: No dates set.

1 Defendant, Dollar Tree Stores, Inc.'s ("Dollar Tree"), by counsel, submits
 2 its Memorandum in Opposition to Plaintiff's Request for Judicial Notice ("Request"), filed
 3 by plaintiff, Robert Runnings ("Runnings").

4 **I. INTRODUCTION**

5 Runnings filed his Request on February 29, 2008, asking that the Court
 6 take judicial notice pursuant to Fed. R. Evid. 201 of a document filed in another court in
 7 an unrelated case, the Declaration of Miles E. Locker in Support of Plaintiffs' Motion for
 8 Class Certification, *Areas v. Pac Pizza*, CIVMSC 06-01715 (Superior Court of California,
 9 Country of Contra Costa) ("Locker Declaration"), which Runnings wishes to submit in
 10 support of his opposition to Dollar Tree's Motion for Summary Judgment.

11 The Locker Declaration is not judicially noticeable because Runnings offers
 12 the document to prove the truth of the matters asserted in the document, which is
 13 impermissible under Rule 201 of the Federal Rules of Evidence.

14 **II. ARGUMENT**

15 **A. Runnings Request for Judicial Notice is Improper Because the**
 16 **Document is Offered for the Purpose of Establishing the Truth of its**
 17 **Contents.**

18 Under Fed. R. Evid. 201, the Court may take judicial notice of adjudicative
 19 facts not subject to reasonable dispute that are either (1) generally known within the
 20 territorial jurisdiction of the trial court or (2) capable of accurate and ready determination
 21 by resort to sources whose accuracy cannot be reasonably questioned. The Court may
 22 take judicial notice of "matters of public record" as long as the facts are not "subject to
 23 reasonable dispute." *See Lee v. City of Los Angeles*, 250 F.3d 668, 689-90 (9th Cir.
 24 2001). Court filings and orders may be properly noticed under Fed. R. Evid. 201,
 25 however, "only for the limited purpose of recognizing the 'judicial act' that the order [or
 26 filing] represents on the subject matter of the litigation." *United States v. Jones*, 29 F.3d
 27 1549, 1553 (11th Cir. 1994) (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*,
 28 969 F.2d 1384, 1388 (2nd Cir.1992)); *see also, General Electric Capital Corp. v. Lease*
Resolution Corp., 128 F.3d 1074, 1082, n. 6 (7th Cir. 1997) ("We agree that courts

generally cannot take notice of findings of fact from other proceedings for the truth [of the matter] asserted therein because these findings are disputable and usually are disputed"); *San Luis v. Badgley*, 136 F.Supp.2d 1136, 1146 (E.D. Cal. 2000) (a court "may take judicial notice of a document filed in another court not for the truth of the matters asserted in the litigation, but rather to establish the fact of such litigation and related filings") (citing *Jones*, 29 F.3d at p. 1553 (quoting *Liberty Mut. Ins. Co.*, 969 F.2d at pp. 1388-89)).

In this case, the only apparent purpose for which Runnings submits the Locker Declaration is to prove the truth of its contents, i.e., that Mr. Locker's assessment of California law is accurate and that his conclusions regarding evidence submitted by the defendant in *Areas v. Pac Pizza* should apply to Dollar Tree's evidence. For example, in footnote 26 of Runnings' Memorandum of Points and Authorities In Opposition to Defendant's Motion for Summary Judgment ("Runnings' Opposition"), the Locker Deposition is offered to provide a legal conclusion as to whether "directly and closely related" tasks are exempt or not. Therefore, the request for judicial notice is not proper under Fed. R. Evid. 201, as the legal conclusions contained in the Locker Declaration are disputable and are disputed.

B. Expert Testimony From Another Case is Not Judicially Noticeable.

The Ninth Circuit has held that taking judicial notice of findings from another case exceeds the limits of Fed. R. Evid. 201. *Wyatt v. Terhune*, 315 F.3d 1108, 1114 (9th Cir. 2003) (citing *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983) (a court "may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it"). Statements in Runnings' Opposition about the evidentiary value of Dollar Tree's store manager certifications are supposedly supported by references to the Locker Declaration at footnotes 15, 20 and 45. Yet a review of the Locker Declaration discloses that Locker is discussing Pac Pizza documents, not Dollar Tree's. In this case, pursuant to the limits of Fed. R. Evid. 201,

